NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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AUG 14 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BERKELEY ROW, LLC, Plaintiff/Appellant, v. RICHARD A. RUIZ and GLORIA A. RUIZ, Defendants/Appellees.	2 CA-CV 2012-0036 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20116257

Honorable Kenneth Lee, Judge

REMANDED

Law Office of James R. Vaughan, P.C.
By Brian K. Partridge
Scottsdale
Attorneys for Plaintiff/Appellant

B R A M M E R, Judge.

¶1 Appellant Berkeley Row, LLC (Berkeley) appeals the default judgment entered in its favor and against appellees Richard and Gloria Ruiz. The Ruizes have not

appeared to defend the appeal.[1] Berkeley argues the trial court erred by limiting post-judgment interest to 4.25 percent rather than eighteen percent as Berkeley had requested in its motion for entry of default judgment. Berkeley contends the contract the Ruizes entered and which it sought to enforce provided for a rate of interest in excess of eighteen percent and thus it therefore is entitled to the higher rate pursuant to A.R.S. § 44-1201(A). We vacate and remand.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the default judgment. *Goglia v. Bodnar*, 156 Ariz. 12, 20, 749 P.2d 921, 929 (App. 1987). The Ruizes entered into a credit card agreement with Chase Bank, N.A. (Chase). The Ruizes failed to make required payments and defaulted on their obligations under the agreement. Chase sold the account to Berkeley, and the principal balance the Ruizes then owed was $14,161.80. Although the agreement provided for an interest rate after default of up to 29.99 percent, Berkeley elected to seek a default rate of eighteen percent.

¶3 On August 26, 2011, Berkeley sued the Ruizes to recover the amount due. On September 1, 2011, Berkeley served them with a copy of the summons and complaint. They failed to answer and, on October 6, 2011, Berkeley filed an entry of default. On January 6, 2012, Berkeley filed a motion for entry of judgment against the Ruizes without

[1]"When a debatable issue is raised on [appeal], the failure to file an answering brief generally constitutes a confession of error." *Gibbons v. Indus. Comm'n*, 197 Ariz. 108, ¶ 8, 3 P.3d 1028, 1031 (App. 1999). However, in our discretion we address the merits of the appeal. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (courts prefer to decide cases on merits).

hearing. The Ruizes failed to respond and the trial court signed and entered judgment, but made a handwritten alteration to the form of judgment Berkeley had presented changing the rate of post-judgment interest from eighteen to 4.25 percent. The court also struck from the form of judgment language indicating the rate of interest was pursuant to contract. This appeal followed.[2]

Discussion

¶4 Berkeley argues the trial court erred in awarding post-judgment interest at a rate less than it sought and for which the Ruizes had contracted. It contends it is entitled to a higher rate of interest pursuant to § 44-1201(A) because the written agreement specifies a particular rate. We review the interpretation and application of statutes de novo. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 49, 180 P.3d 986, 1001 (App. 2008). "Where the language of a statute is plain or unambiguous, courts must observe the natural import of the language used if the meaning does not lead to an impossibility or absurdity." *In re Marriage of Berger*, 140 Ariz. 156, 166, 680 P.2d 1217, 1227 (App. 1983).

[2]Our case law indicates that "[g]enerally, a default judgment is not appealable. Rather, only an order setting aside or refusing to set aside the judgment is appealable." *See, e.g., Kline v. Kline*, 221 Ariz. 564, ¶ 11, 212 P.3d 902, 906 (App. 2009). However, there is no indication this rule applies to the party who sought the default judgment and who could not move to set it aside pursuant to Rules 55(c) and 60(c), Ariz. R. Civ. P. Consequently, we apply the general rule that any aggrieved party can appeal from a final judgment. *See* A.R.S. § 12-2101(A)(1); Ariz. R. Civ. App. P. 1. We remind Berkeley that it could have filed a motion to alter or amend the judgment pursuant to Rule 59(l), Ariz. R. Civ. P., consistent with our preference that "[l]itigation should be concluded where possible in the trial court without appeal," and "[t]o that end, a litigant should be given the opportunity to persuade the trial court of its error." *Maganas v. Northroup*, 112 Ariz. 46, 48, 537 P.2d 595, 597 (1975).

¶5 Section 44-1201 provides in relevant part:[3]

> **A.** Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.
>
> **B.** Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered.

¶6 The trial court awarded post-judgment interest at an annual rate of 4.25 percent, presumably pursuant to subsection B. We conclude, however, Berkeley instead is entitled to post-judgment interest under subsection A. Here the judgment was based on debt incurred pursuant to a written credit card agreement that evidenced an "obligation." § 44-1201(A); *see Black's Law Dictionary* 1104 (8th ed. 2004) (An "obligation" includes "[a] formal, binding agreement or acknowledgment of a liability to pay a certain amount

[3]An amendment to § 44-1201 became effective after the Ruizes entered the agreement with Chase but before the default judgment was entered against them. *See* 2011 Ariz. Sess. Laws, ch. 99, § 15. The amended statute "applies to all loans that are entered into, all debts and obligations that are incurred and all judgments that are entered on or after the effective date of this act." *Id.* § 17. We apply the current version of the statute because this case involves the appropriate interest rate to apply to a judgment entered after the effective date of the amendment.

or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract."); *see also State ex. rel Ariz. Structural Pest Control Comm'n v. Taylor*, 223 Ariz. 486, ¶ 11, 224 P.3d 983, 985-86 (App. 2010) (noting "obligation" includes binding agreements enforceable by law). That agreement "bears a rate of interest" after default of up to 29.99 percent. § 44-1201(A). Consequently, interest on the judgment "shall be at the rate of interest provided in the agreement"; the eighteen percent interest rate Berkeley sought was consistent with the agreement's terms, and the court erred in awarding a lesser amount. *Id.*; *see also State v. Lewis*, 224 Ariz. 512, ¶ 17, 233 P.3d 625, 628 (App. 2010) (use of word "shall" in statute indicates mandatory provision).

Disposition

¶7 For the foregoing reasons, we remand to the trial court and direct it to modify the judgment to include post-judgment interest as requested in Berkeley's application for default judgment. Berkeley requests an award of attorney fees on appeal pursuant to the parties' agreement. We grant its request pending compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge